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STATE OF MONTANA

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STATE OF MONTANA

IN RE THE MATTER OF THE PROPOSED 2008 MONTANA CODE OF JUDICIAL CONDUCT

WATER COURT COMMENTS TO PROPOSED CODE

(FILED IN RESPONSE TO SUPREME COURT ORDERS DATED APRIL 23 AND MAY 21, 2008)

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WATER COURT COMMENTS ON THE PROPOSED 2008 MONTANA CODE OF JUDICIAL CONDUCT

INTRODUCTION

On behalf of the Montana Water Court, its chief water judge submits the following comments to the Proposed 2008 Montana Code of Judicial Conduct. The majority of the comments are directed to proposed Rule 2.9(A)(1) which addresses ex parte communications involving non-substantive matters. Following the comments on Rule 2.9(A)(1), there are comments on Miscellaneous issues. Finally, in the Summary and on Exhibit A there are proposed solutions to the deficits of Rule 2.9(A)(1).

PROPOSED RULE 2.9(A)(1)

Proposed Rule 2.9(A) prohibits any ex parte communication on any "pending" or "impending" matter. Rule 2.9(A)(1) authorizes a limited ex parte communication for "scheduling, administrative, or emergency purposes, which does not address substantive matters" **provided** "the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage" **and** "the judge makes provision promptly to notify all other parties of the content of the ex parte communication, and gives the parties an opportunity to respond." The terms "scheduling" and "administrative" are not defined and potentially have broad application.

The plain language of the proposed rule appears to require the Water Court, on a daily basis, to notify hundreds of parties when a Water Court staff member answers the telephone and responds to a scheduling or administrative question posed by a litigant, such as: "When is the telephone conference with the water master scheduled in Case 76F-1?"

Although it is unlikely that the intent of the proposed rule is to prohibit such simple scheduling and administrative communications, the undersigned would rather not have to argue that point in response to an ethics complaint filed by a disgruntled or angry litigant seeking to metaphorically bludgeon the water judge with whatever weapon that might be available.

The proposed rule should be modified to address the unique nature of the Water Court. Otherwise, the proposed rule creates a significant hurdle which, if strictly enforced, has the potential to sharply escalate the cost of completing Montana's statewide comprehensive adjudication of water rights and to simultaneously reduce its progress to a crawl, two events which are likely to generate legislative attention.

This proposed rule might work with the district courts. District court judges and their staff are separated from the day to day interaction with litigants though a separately elected clerk of court and the clerk's administrative staff. Additionally,

district court proceedings involve a limited number of litigants in separate and distinct cases which bear no relationship with each other. Providing notice of ex parte communications to a small number of parties in a few cases will not be overly burdensome.

Unlike the district courts, there is no separate Water Court clerk of court and administrative staff. The Water Court staff is composed of eighteen individuals: one court administrator, one clerk of court, four deputy clerks of court, eleven water masters, and one chief water judge. Since the Water Court staff is subject to the chief water judge's direction and control, the proposed rule is applicable to all court staff through Rule 2.9(D) and Rule 2.12(A).

Therefore, every time a litigant telephones one of the Water Court's staff about a "scheduling" or "administrative" matter, the Water Court is engaged in an ex parte communication. Even though the communication "does not address substantive matters" and "the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage," the communication is only allowed under the proposed rule if "the judge makes provision promptly to notify all other parties of the content of the ex parte communication, and gives the parties an opportunity to respond." Rule 2(A)(1), 2(A)(1)(a) and 2(A)(1)(b).

Depending on the status of a particular basin, the Water Court receives about 50 to 150 telephone communications each day. All of these ex parte communications are answered by a member of the Water Court staff and most calls involve a scheduling or administrative matter. In accordance with the plain language of Rule 2.9(A)(1)(b), the judge is then required "promptly to notify all other parties of the content of the ex parte communication" and give "the parties an opportunity to respond." The parties in the Water Court are water right claimants.

All Water Rights Are Interrelated

In Montana's comprehensive statewide adjudication of water rights, the number of parties to be notified of these daily ex parte telephone communications could be in the hundreds because all water rights are interrelated.

The Montana Supreme Court observed long ago that:

> [a] water right suit, such as this, where all parties are seeking relief, is different from most, if not all, other kinds of action. In the case of *Wills v. Morris*, 100 Mont. 504, 50 Pac.2d 858, 860, we said: "Where all of the parties diverting water from a stream and its tributaries are made parties to the action, every party to the suit becomes an antagonist of every other party."

Osnes Livestock Co. v. Warren (1936), 103 Mont. 284, 305, 62 P.2d 206, 215.

As noted by Justice Nelson in his dissent in *Confederated Salish & Kootenai Tribes v. Clinch*, 2007 MT 63, ¶ 140, 336 Mont. 302, ¶ 140, 158 P.2d 377 ¶ 140, "a water system is a unitary resource" and "the actions of one user have an immediate and direct effect on other users," citing *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (9th Cir. 1981). "Where there is not enough water in a river to satisfy the claims asserted against it, the situation is not basically different from that where two or more persons claim the right to the same parcel of land." *Nebraska v. Wyoming*, 325 U.S. 589, 610 (1945).

The Legislature recognized these concepts and incorporated them into Montana's statutes when it authorized the statewide adjudication of water rights. To adjudicate existing water rights, the Legislature identified four water divisions, to wit: the Yellowstone River basin, the lower Missouri River basin, the upper Missouri River basin, and the Clark Fork River basin. Section 3-7-101 and 102, MCA. The Legislature then stated: "because the water and water rights within each division are interrelated, it is the intent of the legislature to conduct unified proceedings for the general adjudication of existing water rights under the Montana Water Use Act. It is the intent of the legislature that the unified proceedings include all claimants of reserved Indian water rights as necessary and indispensable parties . . . ." Section 85-2-701(1), MCA. "The action for the

adjudication of all existing water rights . . . is commenced with the issuing of the order by the Montana supreme court . . . ." Section 85-2-214(1), MCA, (underlining supplied).

There are approximately 219,000 existing water right claims filed in "the action" to adjudicate Montana's water rights. As of June 23, 2008, these claims were owned by 59,467 unique entities. These entities represent the actual litigants in Montana's "pending" statewide adjudication action. Many of these entities are not aware that they are involved in the largest lawsuit in Montana's history and the first notice of their involvement is when they receive a Water Court generated notice in the mail advising them of the issuance of a decree and their right to object.

There are an additional 110,036 unique entities that have the potential to become litigants in the Water Court. When the Water Court issues a basin decree, it is required to provide notice to all known water users within that basin, including the current owners of the existing water rights within a basin (i.e., some portion of the 59,467 entities in the decreed basin who claim existing water rights that are protected by the laws that existed before July 1, 1973) and the other water users in the specific basin who have post June 30, 1973 priority dates (i.e., some portion of the 110,036 entities who use water in the decreed basin) and includes

those who (1) have active permits for water use in Montana; (2) have applied for and have not been denied permits for use of water in Montana pursuant to Title 85, Chapter 2, Part 3, MCA; (3) have been granted a reservation in Montana pursuant to § 85-2-316, MCA; and (4) have received certificates of water rights pursuant to § 85-2-306, MCA. Section 85-2-232, MCA. Many of these water users are very surprised to receive a Water Court generated notice.

Newspaper notice of the issuance of a Water Court basin decree is also published in at least three newspapers of general circulation that cover the water division in which the decreed basin is located. Section 85-2-232(3), MCA.

Once the Water Court issues a decree in one of Montana's 85 basins, it hosts one or more public meetings in the decreed basin. Historically, the number of water users attending a Water Court meeting has ranged from one to three hundred water users. The chief water judge and sometimes a water master attend the meeting, explain the adjudication process, including the scheduling deadlines, and answer administrative and procedural questions. Again, an ex parte communication.

Following the expiration of the objection period, the Water Court steps through the remaining statutory procedures, mails and publishes additional notices, and holds additional public meetings.

Upon receipt of a Water Court generated notice, the first reaction of many is to call the Water Court for information, which then requires a Water Court staff member to explain the adjudication process, including scheduling, administrative and procedural issues - an ex parte communication.

Due Process

The purpose behind the significant effort to notify water users of the adjudication process is to advise them of their right to object to any water right claim identified in the Water Court basin decree, and to provide them with Due Process to facilitate their participation in the adjudication effort. Rule 5, W.R.Adj.R. and *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) stating that parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right, they must first be notified. But, of course, every time the Court notifies water users of the adjudication process, some of those water users call the Water Court for more information, which results in an ex parte communication of a pending matter.

Ex Parte Communications are Inevitable

There are a variety of other instances in which ex parte communications are inevitable. Five illustrations follow.

(1) Water rights are transferable. When real property is transferred, the Reality Transfer Certificate, prepared by the Department of Revenue, contains a water rights disclosure part as required by § 85-2-424, MCA. In the Water Right Disclosure Information attached to the Reality Transfer Certificate, it states: "The Montana Water Court can answer questions about the current status of Statements of Claim being adjudicated by calling 1-800-624-3270 (in state) or 406-586-4364." (Form link is http://mt.gov/revenue/formsandresources/forms/488RTC.pdf) When buyers or sellers telephone the Water Court as directed by the Department of Revenue's form or when buyers are performing their "due diligence" research, a court staff member usually has to explain the adjudication process and then provide detailed information about the adjudication status of the water right claims being transferred. Since the adjudication of all the water rights in any particular basin takes several years to complete, water rights are often transferred in the middle of Water Court proceedings. As amazing as it may seem, there are also occasions when buyers are completely surprised when advised by a court staff member that their newly acquired property is involved in water rights litigation. Such telephone calls often generate questions involving scheduling, administrative, and procedural issues.

(2) Continuing legal education. In 2005, the Montana Legislature accelerated the adjudication effort. Sections 85-2-270 through 85-2-282, MCA. As a result, the Water Court has expanded its continuing legal education effort. For example, when the Tongue River decrees were issued on February 8, 2008, the Water Court held a water law CLE in Miles City for about 10 attorneys who represent water users in the Tongue River area. Notice of the CLE was not provided to all water users in the Tongue River or in the Yellowstone River division.

(3) Enforcement of Water Court Decrees. The product of Montana's water rights adjudication effort is "enforceable decrees." Section 85-2-270(1)(c), MCA. Almost all enforceable decree projects begin with an informal inquiry from a water user or a district court judge to determine whether the Water Court's work on a specific stream is sufficiently complete for a water commissioner to be appointed by a district court in accordance with § 85-5-101, MCA. If the answer is yes, then Water Court staff work with district court judges and their staff, with water users and water user groups, and with the Department of Natural Resources and Conservation (DNRC) staff to prepare tabulations of water rights that will be used by a water commissioner. Rule 31, W.R.Adj.R. Once the preliminary work is complete, the Water Court often hosts public meetings to explain the proposed enforcement project and to answer questions. Rule 31(c), W.R.Adj.R.

(4) Water Adjudication Advisory Committee. The Legislature has directed the chief water judge to appoint a water adjudication advisory committee to provide recommendations on methods to improve and expedite the water adjudication process. The committee consists of three nongovernmental attorneys who practice before the water court; three water users who filed statements of claim with the DNRC; and four ex officio members: the chief water judge or designee, the attorney general or designee, a representative of the DNRC and a representative of the United States. Section 3-7-103(2), MCA. When this Committee meets, there are considerable communications about scheduling, administrative, and procedural issues among the committee members and the public who attend these meetings.

(5) E-mail distribution list. The Water Court maintains an e-mail distribution list (styled as " Water Right Adjudication Info Group"). The list currently contains 51 e-mail addresses, mostly of lawyers who appear in the Water Court. The Water Court notifies the list members of Water Court administrative matters, provides advance notice of the schedule for issuing decrees and holding public meetings, and keeps the list members informed of Supreme Court activity affecting the statewide adjudication effort (such as amendments to the Water Right Adjudication Rules).

Every time the Water Court mails a notice to water users, publishes a notice in a newspaper, holds a public meeting, participates in a water law CLE, or e-mails the Water Adjudication Info Group, water users (all parties in "the action" to adjudicate Montana's water rights), their attorneys and consultants will ask Water Court staff about scheduling, administrative and procedural issues. Each question is an ex parte communication.

Therefore, when Rule 2.9(A)(1)(b) requires a water judge to notify all other parties of the content of any ex parte communication, it is requiring the Water Court to notify hundreds of other parties of the communication and to do so every day until Montana's adjudication of water rights is completed, sometime after the year 2020. The practical realities of Montana's water adjudication make the proposed rule unworkable for the Water Court.

Unique Nature of the Water Court

The comprehensive statewide adjudication of water rights began in 1979. Twenty-two years ago, this Court noted that "[n]o more difficult task has ever been assigned by the legislature to the court system of this state." *McDonald v. State* (1986), 220 Mont. 519, 525, 722 P.2d 598, 601.

Water users were mandated by the 1979 Legislature and ordered by the Supreme Court to file their existing water right claims (with the exception of some stock and domestic rights). Section 85-2-212, MCA; and Supreme Court Order

No. 14833, dated July 13, 1979. Failing to file a claim by April 30, 1982 resulted in a conclusive presumption of abandonment and forfeiture of that right. Section 85-2-226, MCA; and *Adjudication of Water Rights of Yellowstone River* (1992), 253 Mont. 167, 176-77, 832 P.2d 1210.

The adjudication proceeds basin by basin. See attached map. In the 26 years since the claims were filed, many of the original claimants have died or sold their property and their successors do not always understand the adjudication process. By necessity, the Water Court has a history of providing extensive public outreach and education about the adjudication of water rights. If the Water Court is to meet the expectations of the 2005 Legislature, it must continue its historical "hands-on" interactive role with water users and their attorneys.

MISCELLANEOUS

In the Scope of the proposed Rules, the term "Model" is used. Probably, it should be replaced by the term "Montana."

Proposed Rules 2.9(A) and 2.9(B) do not seem much different. Comment 8 authorizes judges to apply their discretion and common sense only with respect to Rule 2.9(B). If a comment can override the plain language of a rule, Comment 8 should include a reference to Rule 2.9(A).

Proposed Rule 2.9(A)(1) authorizes ex parte communication for "emergency purposes," but only if it does not address a substantive matter. Will an

"emergency" ex parte communication ever involve a non-substantive matter? If a true emergency occurs involving a substantive matter (for example, a party is involved in a serious family emergency, suffers a stroke, or heart attack on the eve of trial), is it realistic to prohibit judges from receiving an ex parte communication? These events happen. The undersigned has cancelled two trials based on an ex parte communication of a stroke and a family death.

Proposed Rule 3.10(C) prohibits judges from serving as a family member's lawyer in any forum. Presumably, that means a judge cannot probate a deceased spouse or child's estate. That seems like a very harsh prohibition.

SUMMARY

Practical realities make proposed Rule 2.9(A)(1) unduly burdensome and untenable for the Water Court. A simple solution is to delete Rule 2.9(A)(1)(b) from the Code. Alternatively, Rule 2.9(A)(1)(b) could be modify to allow judges to use their discretion as to whether other parties should be notified and provided with an opportunity to respond. A third alternative is set forth in Exhibit A.

DATED this 10th day of July, 2008.

C. Bruce Loble
Chief Water Judge

Exhibit A

RULE 2.9

Ex Parte Communications

(A) **With the exception of subsection (A)(4),** a judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending* or impending matter,* except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the content of the ex parte communication, and gives the parties an opportunity to respond.

(2) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving

factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

(4) A judge may initiate, permit, or consider any ex parte communication when expressly authorized to do so by law, **or when serving on therapeutic or problem-solving courts, mental health courts, drug courts, or the Water Court. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.**

(B) If a judge receives an unsolicited ex parte communication having a potentially significant bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the content of the communication and provide the parties with an opportunity to respond. If such communication is in writing, a copy of it shall be made available to the parties by retention in a court file.

(C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

COMMENT

[1] To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

[2] Whenever the presence of a party or notice to a party is required by this Rule, it is the party's lawyer, or if the party is unrepresented, the party who is to be present or to whom notice is to be given.

[3] The proscription against communications concerning a proceeding includes communications with lawyers, law teachers, and other person who are not participants in the proceeding, except to the limited extent permitted by this Rule.

[4] A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, drug courts, **or the Water Court**. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.

[5] A judge may consult with other judges on pending matters, but must avoid ex parte discussions of a case with judges who have previously been substituted or disqualified from hearing the matter, and with judges who have appellate jurisdiction over the matter.

[6] The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic. The prohibition does not apply to a judge's effort to obtain general information about a specialized area of knowledge that does not include the application of such information in a specific case. Nor does the prohibition apply to interstate or state-federal communications among judges on the general topic of case management decisions in mass torts or other complex cases, such as discovery

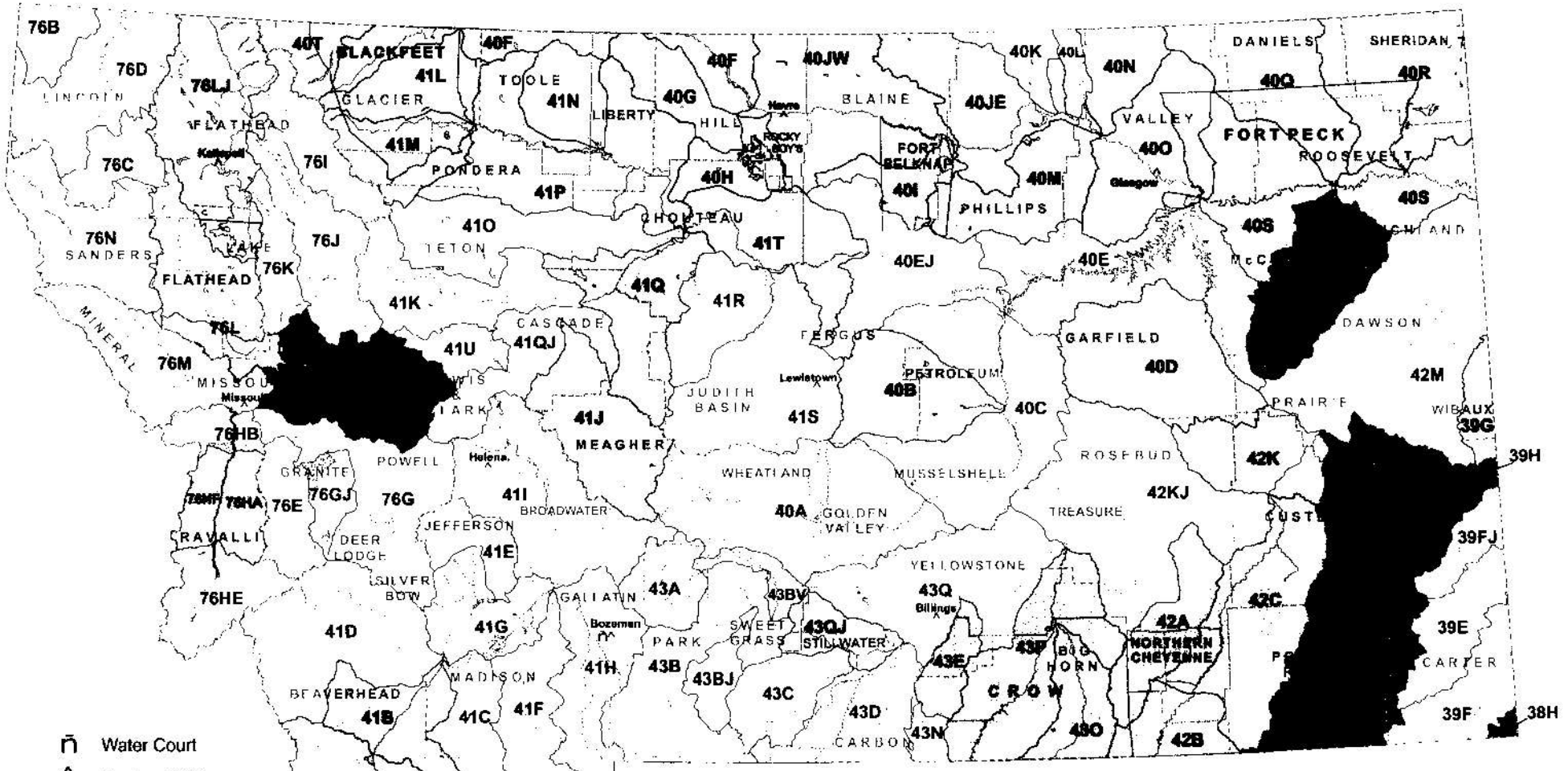
schedules, standard interrogatories, shared discovery depositories, appointment of liaison counsel, committee membership, or common fund structures.

[7] A judge may consult ethics advisory committees, outside counsel, or legal experts concerning the judge's compliance with this Code. Such consultations are not subject to the restrictions of paragraph (A)(2).

[8] In light of the considerable frequency with which judges receive unsolicited ex parte communications, judges should apply their discretion and common sense when called upon to determine whether an unsolicited ex parte communication qualifies as one having a potentially significant bearing upon the substance of a matter, for purposes of paragraph**s A and** B**, and whether other parties should be notified and provided an opportunity to respond**.

Basin Location and Adjudication Status

3/14/08



Water Court

Regional Offices

Enforcement Actions

COUNTIES

RESERVATIONS

Basin Boundary & Decree Status

- Currently Examining
- Summary Report Issued
- Not Yet Examined
- Temporary Decree
- Preliminary Decree
- Final Decree

Water Resources Division
January 2008
Montana State Plane NAD 83